SUPREME COURT SEALS M'CUE'S DOOM FOR EVER

(Continued from First Page.)

is no such practice in the courts of this State as an absolute right of appeal.

The court considers especially, and in exhaustive manner, four chief exceptions relied on by the accused. The first is as to the eligibility of Grand Juror Lyman and the correctness of the method employed by the trial court to ascertain his eligibility. The second is as to the eligibility of Trial Juror J. Y. Stockdell, upon his statements made at the time of his examination as to his fitness. The third is as to the impeachment by the Commonwealth of a witness summoned in its behalf, had upon notice thereof. The fourth and last of the principal exceptions is as to the action of the court in permitting jurors to read newspapers. The statement of Captain Micajah Woods, of counsel for the prosecution, that he had refused a fee to defend the accused, said statement being made before the jury, is also dealt with at some length.

Sustains Judge Morris.

The court sustains Judge Morris in his action in impaneling a jury and submitting to it the question of fact involved in the matter of Grand Juror Lyman's eligibility, declaring this the proper procedure.

In the matter of the eligibility of Trial Juror Stockdell, the court holds that he was not ineligible by reason of having read newspaper reports of evidence in the case prior to the trial. The court was impressed with his fairness and his desire to deal justly with the prisoner and with his conscientious purpose to discharge his duty as a citizen. The court holds that the trend of recent decisions on the questions at issue is in the direction of limiting rather than extending the disqualification of jurors by reason of mere opinion. The declaration of the court upon this question is worthy of prominence in reviewing this opinion. It says:

"The State strains every nerve to disseminate knowledge. By the diffusion of education it hopes to create a higher citizenship and to find the means of repressing vice and crime; but if the courts take an extreme position on this subject and hold that every opinion shall work a disqualification for service as a juror, the administration of justice will be confided, not to the most intelligent, but to the most ignorant of our citizens."

As to the exception regarding the impeachment of its own witness, the court cites as authority therefor section 3351 of the Acts of Assembly, 1904, and holds that in the absence of language specifically confining this act in its application to civil cases, it applies equally to criminal cases. This statute, according to the court, warrants the action of the (trial) court in this case.

In dealing with the exception with reference to permitting the jurors to read newspapers, the court holds that the counsel for the prisoner, and the prisoner himself, as well as the counsel for the prosecution, heard the request made, and offered no objection, and that the court, by tacit consent of counsel, permitted the jurors to read newspapers with the specific promise that they were to read nothing relating to the trial. On this point the court says of the tardy objection of counsel that "litigants are not allowed to play fast and loose with the court. If they are silent when it is their duty to speak, they are not permitted to speak when it is their duty to keep silent."

The court sustains the action of Captain Woods, associate counsel for the prosecution, in defending himself from the criticisms of the counsel for the defendant. Says Judge Keith, on this point, it would be a strange thing if counsel for the accused were permitted to criticise opposing counsel, and that the latter should be obliged to submit in silence under the penalty we are asked to impose in this case.

KNOWS HIS FATE.

McCue Wept When Informed of Supreme Court's Action.

(Special to The Times-Dispatch.)

CHARLOTTESVILLE, VA., Jan. 26.—At 10:30 this morning the news of the refusal of the Supreme Court to grant a writ of error and supersedeas upon the supplementary petition of the attorneys of ex-Mayor J. Samuel McCue was received here. A half hour later a newspaper man called upon the condemned man in his cell at the city jail, and found him writing a letter to his aunt, Mrs. Marshall Dinwiddie. In reply to the query if he cared to hear the news from Richmond, McCue said: "Well, I suppose they refused the petition for a rehearing." He was told that the court had refused, and for a moment he was silent; his lips twitching nervously. Then he said: "Well, I will get justice in heaven." He wept for a while, and then, turning to the letter, which was in the nature of a final communication, he read it to the visitor, interrupted at times by his tears.

The letter was constructed largely of Scriptural quotations, and couched in affectionate and religious phrases. It made no disclosures—in fact, was more in the form of a homily than a communication conveying information. This done, he repeated his frequent phrase that he did not want anything he had said reported to the papers, and declared that he was not reading them, which is known not to be literally true.

Throughout the interview the prisoner's manner was that of a man not surprised by the terrible news, but he has within the week expressed the expectation that a new trial would be granted him. The interview was in grim setting in the doomed man's cell, within a few feet of the scaffold and other appliances in readiness for his violent taking off; but there was nothing dramatic in it. The death watch has never been released. The cell is one of exceptional security, and even if the prisoner had the usual appliances for jail-breaking, he would still be hopeless. There is nothing in his manner to indicate that he would attempt to get away if the opportunity was afforded.

The news of the court's decision was received with satisfaction. While the expected has happened, there was some fear that the case would be allowed by some means or other to drag along and keep the city under the shadow of the tragedy.

The strongest wish here is to reach the inevitable end as soon as possible and to be over with it.

TEXT OF THE OPINION.

Judge Keith's Review Notable for Strength and Clearness.

The full text of Judge Keith's remarkably strong opinion is appended:

M'CUE
vs.
COMMONWEALTH.

Opinion by James Keith, president.
Richmond, Va., Jan. 26, 1905.

Upon a petition for a writ of error. Corporation Court of City of Charlottesville.

Petitioner was indicted by a grand jury in the Corporation Court of the city of Charlottesville on September 19, 1904, for the murder, on the 4th of September preceding, of his wife, Fannie M. McCue. At a subsequent term of the court he was tried upon this indictment, and on the 5th day of November the jury found him guilty of murder in the first degree; the court sentenced him to be hanged, and he thereupon applied to this court for a writ of error, which was refused, the court being of opinion that the judgment complained of was plainly right. At a subsequent day a supplementary petition was filed, asking the court to rehear its judgment refusing the writ of error, and upon the original and supplementary petitions the case is now before us for consideration.

The first assignment of error is to the judgment of the Corporation Court upon a plea filed by the petitioner, in which he alleges that Lyman, one of the grand jurors finding the indictment, was not a resident of the city of Charlottesville. To this plea the Commonwealth, by its attorney, filed a replication. Thereupon the court empaneled a jury and made up and propounded to it the issue whether or not said Lyman was at the time of finding the indictment a resident of the city of Charlottesville. This issue was found by the jury in the affirmative, and the action of the court in overruling prisoner's motion to set aside the verdict and entering judgment thereon constitutes the petitioner's first assignment of error.

It was decided in Commonwealth vs. Cherry, 2 Virginia Cases, 20, that, by force of the common law, where a bill of indictment is found by a grand jury, one of whom is an alien or otherwise disqualified by law, the bill or presentment may be avoided by plea. Commonwealth vs. Long, Ib., 318.

In Commonwealth vs. St. Clair, 1 Gratt., 568, it was pleaded in abatement to the indictment that one of the grand jurors was not a freeholder. Upon that plea an issue was made up, tried at the bar of the court by a jury, the issue found for the defendant, and the indictment quashed.

In Day vs. Commonwealth, 2 Gratt., 563, the prisoner plead in abatement that one of the grand jurors was at the time of finding the indictment a surveyor of a highway. To this plea the attorney for the Commonwealth replied generally, and thereupon the court decided the issue against the prisoner. The general court was of opinion that the issue so joined was one of fact, and that it should have been submitted to a jury, and for this error the judgment was reversed and a new trial awarded.

Counsel for petitioner criticises the replication which the court permitted to be filed to the plea in this case, upon the ground that it concludes with an offer "to verify," when it should have been "to the country."

Trivial Consideration.

We shall not stop to inquire into this nicety of pleading. The injury of which the petitioner complained was that he had been indicted by a grand jury upon which there was a juror incompetent by reason of the fact that he was not a resident of the city of Charlottesville. That issue was submitted to a jury, which heard the evidence and decided it against him. We cannot permit the grave interests presented in this case to be determined upon a consideration so trivial. It is certain that no right of the prisoner was prejudiced by the ruling of which he complains. The verdict of the jury upon this issue must be considered in this court as upon a demurrer to evidence, and the evidence was, in our judgment, so considered, sufficient to sustain it.

The second assignment of error is as to the qualification of the petit juror, J. Y. Stockdell, who was challenged by the petitioner.

He was asked, if he had formed or expressed an opinion; to which he replied, "I formed an opinion on the newspaper evidence." He was reminded by counsel that in law the prisoner was presumed to be innocent, and he was asked, "In your present state of mind, could you go on that jury starting out with that presumption of innocence in your mind?" A. "I could not say that I could, sir, for the reason that I have read this evidence. Naturally there is some impression on my mind, but I cannot say that it is biased or prejudiced. The only thing I have heard is one side as published in the newspapers. I must say that everything I read in the newspapers was one side." After further question and answer, counsel asked the juror this question: "In spite of what you have read and heard, you could go upon this jury and give the prisoner a fair and impartial trial, according to the instructions of the court and the evidence as detailed by the witnesses?" A. "I fell that I am a fair-minded man." Q. "But I also understand, Mr. Stockdell, that what you have read in this case has destroyed in your mind the presumption of the prisoner's innocence; that you would not go on the jury presuming him to be innocent?" A. "I don't know about that. It is a question as to drawing a line between thinking him innocent and knowing him to be guilty, which I don't know."

In answer to other questions, the juror stated, "that as a fair-minded man I could render a verdict according to the law and the evidence, not biased. I have no prejudice one way or other;" and that as to innocence or guilt, he would be governed by the evidence and the instructions of the court.

Juror Questioned.

After numerous questions had been asked and reiterated, the object of which was to ascertain the precise character and strength of the opinion which the juror had formed and expressed, counsel asked him the following question:

"Do you feel at this moment that there is a presumption in your mind that this defendant is an innocent man?"

To which he replied: "I would like to say this: that I feel that I am an honest and unbiased man and as such that I could enter this jury unprejudiced and unbiased and give the prisoner a trial according to the law and the evidence. If I did not feel so, I would want to be turned out, but at the same time I feel that I could serve, and am called here to serve, and that it is therefore my duty to serve."

(By the court): "Do you feel that you can go into this trial leaving your mind open to the evidence, free from any previously read accounts in the newspapers and go through the trial believing him innocent until he is proved guilty?" A. "Yes, sir."

And thereupon the juror was accepted.

The cases upon this subject are almost without number, and they are not to be reconciled. The trend of recent decisions is in the direction of limiting, rather than extending the disqualification of jurors by reason of mere opinion. Whatever the mind receives has an effect upon it, passing with almost infinite gradation from a mere impression to a fixed belief. The State strains every nerve to disseminate knowledge. By the diffusion of education, it hopes to create a higher citizenship and to find the means of repressing vice and crime; but if the courts take an extreme position upon this subject and hold that every opinion shall work a disqualification for service as a juror, the administration of justice will be confided, not to the most intelligent, but to the most ignorant of our citizens. The courts, therefore, while resolute in seeing that every man shall be tried by an impartial jury, inquire into the quality and degree of the opinion and to that end search the conscience of the juror upon his voir dire, and look into the sources of the information upon which his opinion rests.

No man can read the rigid examination to which this juror was subjected without being impressed with his fairness, with his desire to deal justly by the prisoner, and with his conscientious purpose to discharge his duty as a citizen.

Cites Other Cases.

In Moran's case, 9 Leigh, 651, two jurors were examined upon their voir dire. One stated that he had heard the case spoken of in the town, and rumors in regard to its circumstances, upon which he had expressed no opinion, though he believes those rumors to be true, and if they should turn out upon the trial to be true he has a decided opinion in regard to the case; but he feels no prejudice, and is satisfied that he shall be able to decide the case upon the evidence which may be given in, uninfluenced by the rumors he had heard. His opinion was that if the prisoner had stabbed the deceased under the circumstances which he had heard, he ought to be punished. The other juror stated that he had made up no decided opinion; that he had heard a part of the evidence of one witness and formed an impression, and if the balance of the testimony should run that way, that impression would be confirmed; that so far as the evidence went he had a decided opinion, if the rest should not run against it; but that he had no prejudice, had not expressed any opinion, and was prepared to decide the case according to the evidence which might be given in, uninfluenced by the portion of evidence he had heard. Both jurors were held to be competent.

In Smith vs. Commonwealth, 6 Gratt., 696, a juror stated that he had read the evidence as published in the newspapers, and had formed and expressed the opinion, though it was not a decided one, that the prisoner was guilty; that he was satisfied that he could give the prisoner a fair and impartial trial, notwithstanding his impressions and without being influenced by them, on hearing the evidence adduced at the trial. Another stated that he had formed and expressed a decided opinion, founded on a report of the evidence before the Mayor, published in the papers, but not such an opinion as would influence his mind if accepted as a juryman; that the opinion so formed would naturally be recalled to his memory, but that he would be governed solely by the evidence which might be given in court. Held that both were competent jurors.

In Clore's case, 8 Gratt., 606, a juror stated that he had not heard any of the evidence, nor had he heard any report of it from those who had heard it, but from the rumor of the neighborhood he had formed an opinion, which at the time he spoke was existing on his mind, and which he should stick to unless the evidence turned out to be different from what rumor had reported it to be; that he had no prejudice nor partiality for or against the prisoner, and believed he could give him a fair and impartial trial, according to the evidence that should be given in. Held, that he was a proper juror.

In Jackson's case, 23 Gratt., 919, Judge Moncure, delivering the opinion of the court, goes fully into this subject. He says: "There is no question, perhaps, about which there has been more apparent conflict of decision in this State, or in regard to which it is more difficult to derive from our many cases on the subject any definite rules which will apply to all cases that may arise. The object of the law is to secure to every man who is charged with a criminal offense a trial by an impartial jury, and this rule has been established by the cases, if no other, that if a venireman has formed, and still more, if he has formed and expressed, a decided or substantial opinion as to the guilt or innocence of the accused, no matter upon what ground it was formed, whether from having heard the evidence on some former trial or examination, or from mere rumor or otherwise, he is an incompetent juror to try the case, and if, on the other hand, his opinion be merely hypothetical, he is not incompetent on that ground. The difficulty is in determining in any given case whether the opinion be decided or substantial, or merely hypothetical, there being in almost every case some peculiarity of circumstance. And the desire to remove or lessen this difficulty by laying down certain other rules for our guidance has been the fruitful source of the apparent conflict in many of the cases. Thus, if a venireman has formed an opinion as to the guilt or innocence of the accused from having heard the evidence on a former trial or examination of the case, it would be difficult, if not impossible, to regard such opinion otherwise than as decided or substantial, within the meaning of the rule, and he would generally, if not always, be considered an incompetent juror, even though he might think and say that he could give the accused an impartial trial. So, on the other hand, if a venireman has formed an opinion as to the guilt or innocence of the accused, from mere rumor, the presumption, in the absence of evidence to the contrary, is that such opinion is merely hypothetical, and will be so considered, even though he speak of it as a decided or substantial opinion, if he says he has no prejudice against the accused and thinks he can give him a fair and impartial trial. But if the court be satisfied, either from the venireman's own statement, or otherwise, that the opinion is in fact decided or substantial, he will be an incompetent juror. There are intermediate cases which often give rise to difficulty on this subject. The venireman may have formed an opinion from having heard a part only of the evidence on a former trial, or from having heard the whole or part of the evidence given on a former trial through persons who were present, in whose veracity and accuracy he may have more or less confidence, or from having read an account of such evidence in a newspaper. We cannot lay down any rule for the government of such cases, except the general rule before stated, and the court must determine, as best it may, whether the opinion be decided or substantial, or merely hypothetical. It would be dangerous to lay down a rule, and no case has ever decided that a venireman who has formed an opinion from accounts received from witnesses out of court, and still less from accounts received from others as to statements made by witnesses, either in or out of court, is therefore necessarily an incompetent juror, even though he may regard the persons from whom he received his information as persons of general veracity and accuracy, and may credit what he has heard from them. We know that witnesses who make statements out of court of transactions about which they may have testified in court, still more persons who profess to detail what they may have heard in or out of court, often speak carelessly, and generally omitting particulars which may be very material. And we know that those who listen to them often listen carelessly, and though they almost always form some impression or opinion of the case from what they hear, yet that opinion is not always, and perhaps not often, decided or substantial, in the meaning of the rule aforesaid. The court must determine that question in all such cases, in view of all the circumstances."

Numerous Authorities.

In the course of his opinion he cites numerous authorities and quotes with approval the language of Judge Summers in Moran's case, supra, in which he uses the following language: "Sustaining challenges to jurors for favor on slight grounds tends to place the administration of public justice in the hands of the most ignorant and least discriminating portion of the community, by which the safety of the accused may be endangered, and the proper administration of the laws put to hazard, and we are, therefore, not disposed to enlarge the grounds of challenge beyond those properly deducible from the cases heretofore decided."

As we have said, the cases are not reconcilable, but we believe those we have cited establish a wise and salutary rule. When to these considerations it is added, as has been frequently reiterated by this court, that great weight is justly due to the opinion of the trial judge, who sees and hears the venireman, we have no hesitation in rejecting this assignment of error.

These considerations lead to the same conclusion with reference to the juror, Wood.

The next exception is as to the competency of the witness, Kaufman, who was introduced by the Commonwealth to prove that a piece of cloth found in the bath room on the day following the alleged homicide was a part of the undershirt worn by the prisoner on that occasion.

Kaufman, it appears, is engaged in the clothing business and is a salesman of and dealer in underwear, but has never manufactured it. Fontaine Eddins, a clerk in a clothing store, was introduced for the same purpose, and both were permitted to testify over the objection of the prisoner.

In this there was no error. It was for the court to say what evidence should be admitted. It was for the jury, before whom the witnesses were subjected to investigation as to their source of knowledge, to determine upon their credibility, and the weight to be given to their testimony.

Held Conversation.

The eleventh exception is to the admission of a conversation between the prisoner and his son, William McCue, as testified to for the Commonwealth by the witness, Martin. In this conversation petitioner, according to the witness, said that he (his son) knew that the statement made by Ernest Crawford about petitioner's having drawn a pistol upon his wife was not true, to which petitioner's son replied by affirming that petitioner did draw a pistol upon his wife. This is objected to upon the ground that there is no suggestion or approximation with respect to the time at which the conversation took place; that it nowhere appears whether it was a week, or a month, or a year, or five years, or ten years, before the homicide.

We cannot think that this objection is seriously relied upon. The whole environment discloses that it took place while the prisoner was confined in jail, charged with the offense for which he was being tried.

It is claimed, however, that it was inadmissible because in effect an accusation against the prisoner by a third person, which was then and there controverted and denied.

The precise language used on that occasion is as follows: The prisoner said to his son: "You know it is not so about what Ernest Crawford said about my drawing a pistol on your mother." To which the son replied: "You did, and she ran in the room and got in the bed with me, and asked me not to let you shoot her."

What was said, with all the attending circumstances, was before the jury, and we are of opinion that there was no error in this ruling of the court.

There are several exceptions to evidence which seem to us to be immaterial, and to discuss which would unduly protract this opinion. That, for instance, of the witness, Covington, who testified that he spoke to petitioner's wife at about twenty minutes before 8 o'clock; that he took off his hat and bowed to her, but that she did not speak; of the witness, Hurley, who heard the prisoner say that his wife's jealousy diminished his pleasure and enjoyment in life.

The fifteenth exception is to the testimony of Dr. Nelson, who was permitted to testify as to the effects of a blow struck by a sand bag or other similar instrument.

It hardly requires the learning or experience of a practitioner of medicine to know that if a man was struck by a sand bag a blow sufficient to render him unconscious, there would be, at least, some slight discoloration or external mark or after effect consequent upon the blow. This assignment of error is also overruled.

The assignments of error from the sixteenth to thirty-third, inclusive, present a question of much importance in this prosecution.

William McCue, a son of the prisoner, was introduced as a witness by the Commonwealth, and it speedily appearing that he was adverse to the Commonwealth and favorable to the prisoner, the Commonwealth, alleging that it was surprised, asked and was permitted to introduce evidence to show that the witness had made statements inconsistent with his testimony.

So much of section 3351 of Virginia Code, 1904, as is pertinent to this inquiry, is as follows:

"A party called to testify for another, having an adverse interest, may be examined by such other party according to the rules applicable to cross-examination.

"(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the court prove adverse, contradict him by other evidence, or by leave of the court prove that he has made at other times a statement inconsistent with his present testimony, but before said last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. In every case the court, if requested by either party, shall instruct the jury not to consider the evidence of such inconsistent statements, except for the purpose of contradicting the witness."

The law just quoted is so comprehensive in its terms that we shall content ourselves with observing that it warrants the action of the court in this case, unless, as the petitioner insists, its operation is to be confined to civil cases. The law of evidence is in general the same in civil and in criminal cases. In each case the object is the same—to place evidence before the jury which will enable it to arrive at a just decision upon the issues. It has long been a subject of investigation before the court, text-writers and legislatures, how far it is permissible for a party to contradict his own witness.

In Wigmore on Evidence, Vol. 2, sections 897 to 908, inclusive, the whole subject is exhaustively discussed, and the views of eminent authorities given.

Lord Ellenborough is quoted as saying, in Alexander vs. Gibson, 2 Camp. 555: "If a witness is called on the part of the plaintiff who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed; but I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted."

Chief Justice Tindal's remarks, in Bradley vs. Ricardo, 8 Bing. 58, are cited: "The object of all the laws of evidence is to bring the whole truth of a case before the jury; * * * but if this contradicting evidence were excluded, that would no longer be the just ground on which the principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables and to be bound by the statements of a witness whom he might call without knowing he was averse, who might labor under a defect of memory, or be otherwise unable to make a statement on which complete reliance might be placed."

The reasoning and authorities range all the way from permission to refresh the memory of an adverse witness by cross-examination, to the practice which finds expression in the statute under consideration of proving his inconsistent statements.

In England the subject was referred to a commission composed of eminent jurists, and they reported in favor of the admission of impeaching testimony by proof of contradictory statements. For the admissibility of the proposed evidence it is said that this course "is necessary as a security against the contrivance of an artful witness who otherwise might recommend himself to the party by the promise of favorable evidence (being really in the interest of the opposite party), and afterwards by hostile evidence ruin his cause; that such a power is necessary for the purpose of placing the witness fairly and completely before the court, and for enabling the jury to ascertain how far he deserves to be believed; that the ends of justice are best attained by allowing the fullest power for scrutinizing and correcting evidence, and that the exclusion of the proof of contrary statements might be attended with the worst consequences. The chief objection to the proposed evidence appears to be that a party, after calling a witness as a witness of credit, ought not to be allowed to discredit him. The objection proceeds upon the supposition that the party first acts on one principle, and afterwards, being disappointed by the witness turns around and acts upon another, thus imputing to the party something of double dealing or dishonest practice. But it is evident that this does not apply to the case where a party, having given credit to a witness, is deceived by him and first discovers the deceit at the trial of the cause. To reject the proposed evidence in such a case, and repress the truth, would be to allow the witness to deceive both jury and party."

In Babcock vs. People, 13 Colo. 519, Judge Elliott said: "The tendency of recent legislation, as well as of modern decisions, has been to relax somewhat the rules of evidence, so as to afford better opportunity for the development of truth. Modern experience has also shown that a party may sometimes be deceived in the character and animus of a witness whom he has called, as well as in the testimony he is expected to give; and he learns after the witness begins to testify—a very inopportune time—that he has to encounter bitter and unscrupulous opposition where he had expected to receive only fair and honorable treatment. This may be evidenced by reluctance or evasion on the part of the witness in answering questions, or by too great readiness in making or volunteering damaging statements contrary to his previous version of the matter. Under such circumstances * * * in extreme cases, where it is apparent that a witness is giving testimony contrary to the reasonable expectation of the party calling him, such party should be allowed to cross-examine such witness, for the purpose of refreshing his recollection, with the view of modifying his testimony or of revealing his animus in the case * * * and to ask him if he has not theretofore made other or different statements from those he has just given in evidence."

In this whole discussion, as given in Wigmore, the reasoning adduced and the authorities cited, apply indifferently to civil and criminal cases; the civil cases being, of course, far the more numerous.

The English statute is given, passed in pursuance of the recommendation of the commission on procedure heretofore referred to. "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony."

"It is easy to imagine," says the author, "the confusion caused by this bungling paragraph; for the showing of an error by ordinary contradiction, provided for in clause 3 was already freely permissible without interference by the judge and whether or not the witness was adverse. * * * As the statute stands, the present class of evidence, self-contradictions, is admissible only by leave of the judge and in case of a witness deemed adverse by the judge. In the United States, fortunately only a few jurisdictions have adopted the English statute. But the variety of attitude in the different jurisdictions and the indiscriminate citation of rulings from other courts, together with the indecision of the earlier English precedents, has tended to produce confusion in our law, even within the rulings of the same jurisdiction. The sound and simply remedy would be by statute to abolish all limitation on this kind of evidence; and this step has in some States already been taken."

The English statute quoted was passed in the seventeenth and eighteenth of Victoria. It applied only to civil cases; but by statute of the twenty-eighth and twenty-ninth of Victoria, it was extended to criminal cases.

In Hickory vs. U. S., 151 U. S., 303, which was upon an indictment for murder, Chief Justice Fuller says: "When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness * * * but proof of contradictory statements of one's own witness, voluntarily called and not a party, inasmuch as it would not amount to substantive evidence and could have no effect but to impair the credit of the witness, was generally not admissible at common law.

"By statute in England and in many of the States, it has been provided that a party may, in case the witness shall in the opinion of the judge prove adverse, by leave of the judge, show that he has made at other times statements inconsistent with his present testimony; and this is allowed for the purpose of counteracting actual hostile testimony with which the party has been surprised."

This citation is of value in two aspects. In the first place it shows what the common law was; it shows the tendency of modern thought upon the subject; and, although made in a case where a man was on trial for his life, rests the statements of law upon adjudications in civil cases.

Under these circumstances the Legislature of Virginia adopted the statute which we are now considering. Its language is broad and general; there is not a suggestion upon its face of the purpose to limit its operation to a particular class of cases. The evils are the same in criminal cases as in civil. It is invoked to-day by the Commonwealth; it may be to-morrow the last hope of an innocent man.

Against all this it is urged that the statute is found in the Code under the title of "Proceedings in Civil Cases." Embraced in that title are a number of chapters upon a great variety of subjects, many of which are obviously of a civil nature, others specifically declared to be of that character. In the chapter upon "Evidence" in which section 3351 is found, there are sections which, either from their subject matter or by their express terms, apply to civil cases. There are other sections which by their express terms apply to criminal cases, for example, sections 3349, 3352 and 3352a, the first mentioned referring to the competency of husband and wife to testify for or against each other in civil and criminal cases. We find, therefore, section 3351 placed in the midst of sections applicable alike by their terms to criminal and civil cases, and the operation of that section not extended upon the one hand, nor limited, upon the other, to a particular class of cases, but its application to be determined by other considerations. We cannot think that the mere collocation of this section should override every other consideration and require the courts to confine it to civil cases, when it is a remedy for an evil as great in criminal as in civil cases, and the consequences of which may be even more serious.

Are Not Well Taken.

We are of opinion that these assignments of error are not well taken.

A careful perusal of the instructions satisfies us that they fairly submitted to the jury the principles of law by which they should be governed in the consideration of the evidence. It would be impossible to prepare instructions to which an ingenious critic might not present plausible objection. The definition of "reasonable doubt" is attempted by the court. It is a difficult, if not an impossible, task so to define it as to satisfy a subtle and metaphysical mind, bent upon the detection of some point, however attenuated, upon which to hang a criticism. But no unbiased person can read these instructions without having the conviction forced upon him that every safeguard which the benignity of the law throws around a prisoner upon trial was accorded to the petitioner in this case.

Two instructions asked for by the petitioner were refused by the court, one of which undertakes to define reasonable doubt as follows: "The court instructs the jury that by reasonable doubt is meant such doubt as would cause a man of average prudence to hesitate about a matter of his own, of like importance to himself as the case on trial is to the accused."

It would have been impossible for the jury to make any practical application of the proposition sought to be formulated in this instruction. There could be no case of importance to a man such as "the case on trial was to the accused," unless he himself stood upon his deliverance before a jury, charged with a capital offense.

But the instruction was properly refused upon the further ground that the instructions of the court upon the subject of reasonable doubt were ample and correct guides to the jury upon that branch of the case.

The court was asked to instruct the jury "that, under the humane policy of the law of this State, it is considered infinitely better that ninety and nine (that is, an indefinite number of) guilty persons should escape punishment than that one innocent person should be punished, and, therefore, it is far better that the jury should err in acquittal than err in convicting."

We have heard it said, and it is sometimes stated in the opinions of courts, that it is better that ninety and nine guilty persons should escape than that one innocent person should be punished. We have no fault to find with the expression as a rhetorical phrase, but as a guide to a jury in reaching a conclusion it is of no value. That no guilty men should escape is equally indisputable, but it would hardly find a proper place in an instruction to a jury. The object of courts and juries is to shield the innocent and to punish the guilty, and in this case the jury were told that the accused was presumed to be innocent until his guilt was established by the Commonwealth beyond a reasonable doubt; that this presumption of innocence goes with him through the entire case and applies at every stage thereof, and that if, after having heard all the evidence, the jury have a reasonable doubt of the guilt of the accused upon the whole case, or as to any fact essential to prove the charge made against him in the indictment it is their duty to give him the benefit of the doubt and find him not guilty. And, further, that if upon the whole evidence there is any reasonable hypothesis consistent with the innocence of the accused, they must find him not guilty; that the failure of the evidence to disclose any other criminal agent than the accused is not a circumstance which may be considered by the jury in determining whether or not he was guilty of the crime wherewith he is charged; that he is presumed to be innocent until his guilt is established, and he is not to be prejudiced by the inability of the Commonwealth to point to any other criminal agent, nor is he called upon to vindicate his own innocence by naming the guilty person.

Young McCue's Evidence.

It is also to be observed that the court was careful in instructing the jury as to the weight to be given to the evidence of contradictory statements made by the witness, William McCue, and others. The jury was warned that this evidence was admissible only to contradict the witness, and not to be taken as substantive proof of the facts related by the witness, or, in the terms of the statute, that they were not to consider the evidence of such inconsistent statements except for the purpose of contradicting the witness.

During the closing argument for the prosecution, Captain Micajah Woods, who had assisted the prosecution, arose, and in the presence of the jury said to the court: "With the gracious consent of the gentlemen on the other side and the Commonwealth's Attorney, I would like to make one statement, not pertaining to the merits of this case, but in view of the attack, which may not have been so intended, but which sounded to me ungenerous, as an ungenerous attack made upon me by the distinguished gentleman, and who has made so able a speech, I desire to say that I refused a large fee in this case to prosecute—"

Counsel for the prisoner objected to the statement and asked that the jury be discharged in view of that statement.

"It appears in the bill of exceptions that counsel for the prisoner had in his argument, criticised the position of Captain Woods in acting as prosecutor, under the compulsion of public opinion, of a man he admitted had been his friend for twenty years.

The right of the public prosecutor to have associated with him an attorney to assist in the prosecution is established law in this State, and it is not a proper subject of animadversion. He is as lawfully there to assist the prosecution as counsel for the defense to defend the prisoner, and so long as he keeps within proper bounds, he is not open to criticism before the jury. It would be a strange thing if counsel for the accused were permitted to criticise opposing counsel, and that the latter should be obliged to submit in silence under the penalty we are asked to impose in this case. There is no merit in this exception.

The jury having rendered a verdict of guilty of murder in the first degree, the accused moved to set aside the verdict, among other reasons, because the jury were permitted during the progress of the trial to read, and did read, certain newspapers containing references to and comments upon the case, pending the trial of the same.

It appears that "before the jury was sworn, and in response to a request from one of the jurors, the court stated to the members of the jury that they might be permitted to read such portions of the daily newspapers as in no way related to this trial, but that they must scrupulously avoid any parts of said papers as had any reference to this trial, which the said members of the jury then and there severally promised to do. And the sergeants were then instructed to carry out this instruction of the court. At the time this instruction was given neither the prisoner or his counsel, they being present, made objection, though they were not asked by the court if they had objection.

In Hunter vs. State, 43 Ga., 483, after some of the jury were in the box, but the whole not impaneled, and in the presence of the court, those sworn were seen by counsel for accused reading a newspaper which contained an article reflecting upon the counsel for prisoner, and no motion or notice was then taken in regard thereto. It was held that this was not such irregularity upon the part of the jury as would be sufficient to set aside the verdict, and that such acts transpiring in the court-room and in the presence of the court and of counsel, when not objected to, will not be favorably regarded after the verdict.

In Bulliner vs. People, 95 Ill., 394, counsel for a defendant handed a juror a newspaper to read, after he was sworn, but before the panel was filled, and afterwards, on the trial, his attention was called to the fact that another juror was reading a newspaper in which was an article purporting to contain a report of the trial, and commenting upon the case unfavorably to the defendant and made no objection thereto, but stated privately to the court that it was best to say nothing about the matter, as it might give the article undue prominence and do the defendant more harm than good, it not appearing that the prosecution was responsible for the act. It was held that this irregularity was waived and could not be urged by the defendant as error to reverse a judgment of conviction, and that a prisoner on trial has no right to stand by and suffer irregular proceedings to take place and then seek a reversal for the same. Like any other defendant, if he neglects in proper time to insist upon his rights, he waives them.

In McKinney vs. People, 2 Gilm., 550, it is said: "A prisoner on trial under our laws, has no right to stand by and suffer irregular proceedings to take place and then ask to have the proceedings reversed on error on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglects in proper time to insist upon his rights he waives them."

So, it is uniformly held in civil as well as in criminal cases for, as we have al-

(Continued on Eighth Page.)